UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC, Index No.
08-01789(BRL)

Debtor.
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IRVING H. PICARD, as Trustee for the
Liquidation of BERNARD L. MADOFF
INVESTMENT SECURITIES LLC,

Plaintiff, Adv. Pro No.
09-1172(BRL)

V.

STANLEY CHAIS, et al,

Defendants.

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May 5, 2010
United States Custom House
One Bowling Green
New York, New York 10004

In Re: Hearing

B E F O R E:
HON. BURTON R. LIFLAND,
U.S. Bankruptcy Judge

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PROCEEDINGS

THE COURT: Bernard L. Madoff Investment Securities, Debtor; Irving H. Picard, as Trustee versus Stanley Chais, et al.

MR. SMITH: Good morning Your Honor.

MR. SHEEHAN: Good morning. For the record, David Sheehan with Baker Hostetler for Irving H. Picard, as Trustee. With me our my two colleagues, Marc Hirschfield and Paul Eyre. Each of us will respectfully handle a certain portion of the Chais applications as I refer to them. Today we will be dealing with all the defendants. I guess the best way to put it, is that I we will dealing with the Chais applications that are due March 8. There are two other applications out there that will be dealt with in today's hearing by my colleagues.

MR. WHITE: Good morning, Your Honor.

THE COURT: Good morning.

MR. WHITE: My name is Phillip White, and with me is my colleague Andrew Sherman. I think we represent most of the defendants that Mr. Sheehan is talking about. We represent about 46 individuals and entities that are listed, and there are some stipulations that we will file with the Court. It be would be hard for me to list them all here. I would call them the Chais related parties as to distinguish it from the fact that we

do not represent Mr. Stanley Chais, individually, himself.

MS. KLESTADT: Tracy Klestadt, from the law firm of Klestadt & Winters. I represent Michael Chasalow.

MR. WHITE: I guess the first order of business is our motion to dismiss under 12(b)(6) for failure to state a claim.

I gather that we have agreed what we will do is handle the motion seriatim so that would be first on the agenda. And the motion we filed on behalf of Mirie Chase to dismiss for lack of personal jurisdiction would be handled fairly quickly.

THE COURT: Sure.

MR. WHITE: I guess I am better off at the podium. Is that what you would prefer, Your Honor?

THE COURT: Whatever make you comfortable.

MR. WHITE: I am new to the Bankruptcy Court, Your Honor. I would like to thank you for hearing me and forgive my lack of experience in your courtroom.

THE COURT: It is the same as every other courtroom in the circuit that I know of except for the Court of Appeals.

MR. WHITE: Well, that is good to know, Your Honor.

THE COURT: We don't have lights that cut

you off. Sometimes I cut you off.

MR. WHITE: My intention is to be relatively quick, frankly, Your Honor, because I don't think counsel's role in the motion to dismiss is to go over everything that is in the briefs.

The Court is well aware of the intricacies of the laws of fraudulent conveyances, and other issues that Your Honor may have that you would like to question me about. I don't intend to spend much time doing that kind of thing.

I would like to try to focus the Court on a couple of key things that made this motion to dismiss different than the run of the mill. We all as litigators are very accustomed to people getting sued and it feels almost like an ordinary event. Fraudulent conveyance I am told by my colleagues in the bankruptcy bar is not an extremely serious type of allegation.

To me I want to ask the Court as I have to suspend that feeling of routineness for a moment and put yourself in the place of the children of Stanley Chais who I do represent with the exception of Mr. Chasalow, who are just ordinary people. Obviously, very wealthy before December of 2008, but who are human beings.

In December of 2008 they woke up one morning and find out their lives are changed because Bernie

Madoff turned out to be a pretty bad guy taking along other people's money.

You know what? They went to work that day like other people and I suspect they got some sympathy and whatnot from their colleagues in their community a few months later though the complaint that has been filed here trickles out and the result is probably very different.

Here they are accused of being active participants in what is the largest, ugliest Ponzi scheme in the history of the United States.

And while we may think of a fraudulent conveyance as a kind of routine thing this complaint alleges that they, in fact, stole $300 million of innocent victims.

We should look at the 9(b) element, which is the first one of the elements I would like to look at.

From the perspective of people who are individuals, there are, of course, lots of entities I represent as well, who are faced with that problem, these people eventually see the complaint and they say, oh, my goodness, what have I done.

What does this complaint tell me about what evil things I have done to be lumped in with Bernie Madoff, and perhaps my father who turns out to be allegedly not a particularly good guy either.

When you look at the complaint, and I have read it a few times, it doesn't say much. It looks like at the end of the day that these people are accused of really the same things that any other investor in the Madoff transactions have been. They had accounts. We don't deny that.

They had distributions, quite substantial distributions as it turns out.

The only other allegation is that in there they had a famous father who turns out to be alleged to have been very close with Bernie Madoff and had done some bad things.

The rest of what is in the complaint has nothing to do with them. I would suggest to the Court that the purpose of Rule 9(b) is to protect people like my clients from this kind of overreaching.

They are supposed to be given particular notice of what it is they did, not of what other people did.

So when you think about, it is the complaint alleges all kinds of things about what Stanley Chais did, outsized returns, manufactured losses, fabricated transactions, and the like.

There is no allegation that my people knew about them, did them, ever spoke to Mr. Madoff or either,

never mind about their accounts or about these transactions, or directed anything or what have you.

They are like anyone else, Your Honor, any other investor who received distributions from Madoff.

Yet, they are treated completely differently, Your Honor. So to me it is really incumbent on the Court here to do the gatekeeper function that 9(b) contemplates.

I represent some 46 individuals and entities. There is not one allegation other than the amounts that were withdrawn from the various accounts that pertains to their specific situation. The ones about what Mr. Chais did or did not do, but there is no allegation that they knew him. The ones about the so-called red flags that related to what general creditors, ordinary folks might have known, is not specific to them.

Even the allegations that relate to some of the specific transactions in what are called the Chais family accounts, they might relate to one of the 40 people or so that are the entities I represent but not to all of them as a whole.

They are treated as some kind of monolithic evil empire in this complaint and the reality is they are not and there is no basis in the complaint for doing that.

I would urge the Court that given the

structure of the complaint to say to the Trustee, look, you have overreached here with regard to these defendants. You could have treated them differently, not alleged they were active participants. Not made claims for actual fraudulent based fraudulent conveyances. You chose not to. You have the obligation to come forward with the goods on what each individual and each entity is alleged to have done or to have knowledge of in those circumstances, you can't treat them all as if they are extensions of the family of Chais.

Now, the complaint deals with that a little bit by saying that Stanley Chais and all of my clients are alter egos of one another.

Well, the New York Law Department does not that I am aware of and there has been no case cited by the Trustee in his opening papers that suggests a human being can be the alter ego of another human being. Nor does the complaint make any of the allegations that are normal to an alter ego or piercing of the corporate veils type of transaction, all of which would be subject to 9(b) and which have a very heightened pleading standard.

So rather when we point this out in the moving papers, rather than going back an amending the complaint or explaining what further explanation there would be or what have you, they respond by changing the

issue. No longer are they saying that they solved the problem of lack of specificity by alter ego kind of allegations. They switched it. They say we are changing to agency now. Stanley Chais was the agent of all the individuals and entities that Mr. White represents.

That is not even in the complaint. So the appropriate means for that, if they would have a basis for that would be first totally inconsistent with the idea of alter ego because in an alter ego claim, of course, the person in charge of this case alleges that Stanley Chais controls all the entities. In an agency arrangement the entities control the agent.

It is the complete opposite of one another. There is no way this complaint could have given anyone notice of that set of allegations and switching in midstream without pleading it is not a fair game. It certainly can't satisfy the exigency requirement of 9(b), Your Honor.

So, Your Honor, that is the main problem, that all these people are lumped together as an entity. This is no explanation of who did what. And there is no allegation that anyone did anything that is actually wrong.

On that basis all of the claims that are predicated on actual fraud should be ripe for being dismissed.

Frankly in this case at this point, the normal repleading should not be done here. It is over a year later, if there are any new factual allegations that is coming in, I think the Court should be assuming what the in complaint is the best they should do otherwise they couldn't amend it.

Let me move on to the next point. For every one of these fraudulent conveyance complaints, there needs to be an allegation in each of the claims that each of the entities was a net winner. That is a requirement in the context of a fraudulent conveyance claim. It is a Ponzi scheme. We don't dispute that.

The opposition papers make a great deal of how we are complaining or trying to argue the net equity in a different format. We didn't even submit papers with regard to the net equity argument and my point is, the Court has, of course, decided the method of calculation that is going to be used, but it doesn't matter what method the Court decides one way or the other for net equity.

The point is you can't figure out if you are a net winner or loser other than on an account by account basis, and by subtracting the amount that is alleged to have deposited against the amounts that are alleged to have been withdrawn.

In the circumstances where many of these

accounts predate according to the allegations of the complaint the creation of Madoff's Ponzi scheme in the early '90s. The complaint itself proves that there has to be some actual deposits made in these accounts that would be offset against the withdrawals. There is no allegations about any of that.

What there is a very lengthy list of withdrawals that were made by my client and an allegation well, they total up to some $300 million. It must be more than they put in and so, therefore, they must be net winners.

That is not enough, Your Honor. It gives no individual defendant notice of what it is being accused of. They are not part of one giant scheme. They are individual trusts and human beings that had various different accounts that are entitled to be given notice for the amounts that they are alleged to have put in versus the amounts they are alleged to have taken out.

So, therefore, there could be some calculation by whatever means of net equity. It is a pleading fall-out, just like the failure to do 9(b) and satisfy the specificities, to fail to allege property net equity and even if there is net equity, other than in a conclusory aggregate sort of way.

The last point I want to point out to the

Court is the issue about the statute of limitations and how it works in this circumstance.

Your Honor, first of all, the main point I am trying to get to is there cannot be claims that survive this motion that go back more than six years since the filing of the petition at a minimum.

The Court will know we made an argument it ought to be go up to the date of the filing of the petition. I will leave that to the papers, but for the moment let's assume that's the petition date of which six years earlier is the cutoff.

The reason is actually relatively simple.

As to the New York DCL we all know it is settled law in the Second Circuit, and in New York there is no tolling available for constructive fraud claims under the DCL for fraudulent conveyance.

So those claims, Your Honor, are limited to the period immediately preceding the petition at a minimum. I am not going to argue about the five months here.

As to the actual fraud claims to the extent there is a claim of tolling that claim of tolling is based upon the fact no one could have discovered it yet, the complaint alleges that anyone could have discovered it.

So you can't have it both ways, Your Honor. There is a dichotomy in the allegations of the complaint,

and while people are entitled to plead in the alternative and are entitled to legal theories but not to alternative facts. The facts are the facts. Either these facts were sufficient for a mythical or a hypothetical creditor to have discovered that Madoff was a fraudster or they were not.

That has opposite consequences for the Trustee's complaints, on the one hand. If you assume they are on a valid basis on which a reasonable creditor or ordinary creditor could have discovered the fraud, then you do get tolling but you get no constructive fraud claims because then you would have good faith.

The other way around, Your Honor, to the extent these things could not have been discovered, you get tolling and no good faith.

My point is what that means and what is important from the standpoint from the people I represent, is that the liabilities that they are faced with here are contained to a six-year period that is measurable rather than reaching back to the beginning of Madoff's relationship with Stanley Chais or the beginning of the accounts and entities that are involved here and I think that even at this early stage of the proceeding given the status of the law they are entitled to that comfort because the law provides for it, and the pleadings that the Trustee

has set before the Court does not sufficiently plead any basis for going back more than the six years.

Your Honor, if you have any questions,or we could talk about inconsistencies, but I suspect you know more about it than I do from your years on the bench, but I am happy to entertain any questions you have. I wanted to focus the Court on those issue.

THE COURT: Thank you. Now, I will hear from the other side. Unless Mr. Klestadt thinks that it is appropriate to speak now.

MR. KLESTADT: Your Honor, I have a separate motion for my client somewhat more -- perhaps a couple of minutes of argument if I may.

THE COURT: Why don't we just focus on the arguments that have just come up.

MR. KLESTADT: Very well, Your Honor. Thank you.

MR. SHEEHAN: Thank you, Your Honor. I think actually the beginning and end of Mr. White's argument sort of answers several questions. He spoke at the beginning of ordinary people and that is who he represents, but indeed that is exactly who the Trustee represents in this proceeding.

All of the ordinary people who did not get their money back, all of those people at the wrong end of

the Ponzi scheme, not like the ordinary people that got hundreds of millions of dollars of fictitious profits. He represents the ordinary people who lost money in this case, in this Ponzi scheme.

In the Ponzi scheme, Your Honor, he should be able to get that money back from the other ordinary people. There is another thing that is important about ordinary people. You and I both know for the year and-a-half in this case there are out there many people who did not know what was going on. They did not have Stanley Chais involved for decades with Mr. Madoff on a virtual daily basis as their dad, as the director of their family trust, as the person who was involved in wide investments throughout Madoff and his entire career practically. They did not have that.

They were out there duped totally. I don't have any question in mind that there is out there not one, but many, if not dozens of hypothetical creditors that fit right in that category. They are not hypothetical but very real and they didn't know.

Your Honor, those two points I think are very salient in terms of where we should go with the motion. The other thing that really strikes me as I listen to Mr. White, there used to be, and I think it is still true that what we should be doing in a complaint is

giving our adversaries and the defendants a road map, to let them know what is going on, what are we really talking about here. Listening to Mr. White I think we gave them quite a road map. I think he knows exactly what is going on. He knows that Stanley Chais together with his children and all the various enterprises outlined in the complaint were actively involved in investing with Madoff for decades and taking out what they now know to be fictitious profits. We believe, and we have alleged that, in fact, Mr. Chais knew and participated.

Just by way of example in the complaint we give several really good examples, we could give dozens and dozens, and I don't know if anyone asks us to prove that in our complaint, but there is more than enough if we only look at the manipulation of the accounts. They are backdated.

I don't know much about any investor, sophisticated or otherwise, but certainly Mr. Chais and presumably his family had some degree of sophistication and would realize you really can't call up and change statements six months after the transaction took place.

That doesn't happen to ordinary people. That happens to extraordinary people like Mr. Chais and his family. That is why they have been sued. That is why we have outlined to them all of those transactions, dozens and

dozens and dozens of transactions going all the way back, yes, and if you look it goes back into the 1980s.

We believe, Your Honor, and we don't have to prove it here today because we are not at a trial but we will at trial prove that the Ponzi scheme went back into the 1980s.

In fact, Mr. DePasquale has stated that, and the facts will come in to prove it that Mr. Chais was well aware of it.

It is not guilt by association. We can't ignore what is the reality. He wants to bring reality into the courtroom. What is the reality? The reality is this is a family, and they talk to one another, and that money transfers by Mr. Chais from one family account to another family court. He takes fictitious profits and puts them into another family account. He is not doing that willy-nilly on his own. It's done by people who know each other.

I don't mean to be facetious when I say this but if this was such an allegation we would allege that there is mishpocha. You know what this means. These people are all family. They all talk to one another. That is obvious from everything that transpires in terms of the transactions in these accounts.

Going back to the beginning as it were,

what we have here is we have an allegation --

THE COURT: The argument is it may be obvious and inferred, but it is not in the pleading.

MR. SHEEHAN: But, I believe, it is, Your Honor, in this sense it outlines what Mr. Chais did. That is true in some detail, but it also outlines there are things happening in these other accounts, not just in his.

It is enough to give you notice. We didn't prove it, I agree with that, but it's enough to give every defendant in this case notice that there were extraordinary profits that should have given you notice, where there were transactions that were backdated, that should have given you notice and not least that there were hundreds of millions of dollars of fictitious profits.

They are on the wrong end of the Ponzi scheme, and the mere fact they were in it this long tells the story. There is more than enough in this complaint that incorporates not Mr. Chais, but all of the other participants here.

Look at it this way, Your Honor, just the mere fact that they got fictitious profits alone, under the bankruptcy statute as we have alleged, gives us the right to get this money back. Good faith or not, that is fictitious profit. That is what we alleged.

We have not, and I agree with Mr. White on

this, given him a final number. That is because that number will be going through some more accounting. We do need their books and records to get their checks. This fraudster, we have really torn apart his records and, we are not sure of every nickel that went in and out. We know hundreds of millions of dollars from 1995 forward was indeed taken, but we need to go back further. We believe it will establish that there is even more than money due and owing, but that is subject to discovery.

We have not hidden the fact that it is out there. We are not sort of hiding everything here. Everything is right in front of the entire group. They know exactly what is going on.

What will happen after this, after we get past this motion will be the fact this will be ordinary discovery. If has been a year. In the last year we could have had a lot of discovery and been further along in this case. They would have real insight beyond what is in the pleading. But they have more than enough notice in this pleading enough to put together their defense and know what is going.

For example, Your Honor, each of these involves a transaction. We have given them all the transactions, we have listed every one of them.

That is what is the heart and soul of the

case, Your Honor, are those transactions. What more do they want us to do? If Your Honor wishes, and I don't mean this in the way to be pejorative, but it would require hundreds and hundreds and hundreds of pages of a complaint to give you every one of those transactions and outline in a way that we will do in discovery, and they will fully realize everything that is going on.

If a pleading requires us to do that, fine, we will go back to the drawing board and do that. We think we gave our adversary a summary of every transaction that is involved, everyone who we are relying upon to prove hundreds of millions of dollars of fictitious profits. That is more than adequate for them to not only have notice but to defend the case. Those are the transactions that are in play.

Two other things, Your Honor, before I sit down. Well, there is one point I would like to make, Your Honor, and it is not hitting me. I think I actually hit it already now that I look at any notes, the statute of limitations.

I, think first of all, my adversary has conceded that we are right in the six-year period and that six months should not be in play.

I think we do believe we have a hypothetical creditor. I do believe we could go back as

far as we can as long as we could establish, and it is our burden and we accept it readily that the Ponzi scheme went back to the date which all these transactions are in play.

I believe the law is in the favor of the Trustee here to liberally allow him to go back and gather in all of those fictitious profits, and all of the misbegotten funds from this Ponzi scheme and to bring them back in to be distributed, and given the facts of this case as we have alleged them, I think we are entitled to do that.

Thank you, Your Honor.

THE COURT: I have one issue that was covered by Mr. White, and I didn't hear your responding to it. The agency theory which you have raised in your brief, that is really not in the complaint itself.

Are you relying on this agency theory to demonstrate fraudulent intent or are you really saying that the mere fact of fraud is sufficient in itself.

I don't know where are you going in the agency theory. I could concede that both agents and principal are involved in some parts of the transaction, but I have difficulty in trying to separate them, and I don't know where you are coming from in the complaint which is not based on an agency theory but perhaps infers it.

MR. SHEEHAN: I think it does, and that is

what we are trying to do in the brief. Putting aside the agency and the fact we develop it, I think you are right about principal and agency here because it can go both ways in this particular setting as facts develop. But it was inferred. We are saying these folks were operating with knowledge of each other because of the fact there is knowledge of those accounts and they are talking to each other about them.

THE COURT: The principal and agency theory raises and falls on the degree of control. That would be both ways. I don't know that the complaint spells out the control on the part of the principal being the individual defendants in one issue and Chais being the principal in another context and having control over all of these accounts.

It may very well be that discovery points outs that there are agreements, that are oral or written, that give the individual defendants the right to make demands to receive funds. But I don't know that the complaint specifically does that or may be inferred doing that.

I haven't heard from you, but you aren't condemned for writing on the theory of agency in your brief, but not in the complaint.

MR. SHEEHAN: Well, let me respond very

briefly to that, Your Honor. I agree with you it is not detailed in the complaint. Mr. White points that out as well. As best I think it is, as Your Honor suggests, it is inferred. Clearly, I think we would have the right through discovery to determine through the documents that Your Honor has alluded to whether that exists or not. What we were arguing in the complaint, which I think is a fair argument is the fact that the knowledge that Mr. Chais had, which clearly he had, I don't think anyone is disputing that here, quite frankly, given the fact he was working as he was with his family and doing what he was doing, that knowledge could be imputed. I think we have the right to prove that.

That allegation is predicated upon an array of facts, and that is that all these accounts over all these years, the manipulation of those accounts by Mr. Chais, and we do allege that he was in fact manipulating those accounts and directing them. There is no question if in so doing that, he did it with the knowledge of the accounts, and in doing that, that knowledge gets imputed.

That is where we are, Your Honor.

THE COURT: Okay.

Mr. White, do you want to respond?

MR. WHITE: Just a couple of quick points. First, it is not our role to dispute what is known or not

known what Stanley Chais did in the proceeding. I feel I would be remiss --

THE COURT: I know Stanley Chais is not a movant for dismissal.

MR. WHITE: He is also not my client. He has a lawyer in the room. I presume he will deny the allegations in the claim when the time comes, I don't want the record to stand uncorrected he didn't dispute it. It is not time to dispute it. When the time comes we will have to decide what to do and what is appropriate under the circumstances. We should not take it as a given as it seems as counsel to the Trustee is suggesting that Stanley Chais did all of these things. I don't know whether he did or did not.

My facts are as they are alleged in the complaint. Okay, that's fine for now. The question is the sufficiency of the allegation, not the truth of the matter of the facts as they are asserted thus far.

It seems to be at the heart of Mr. Sheehan's argument is that this is a family and they talk to each other. I am not sure what else might be implicit in the mishpocha, not having expertise in Yiddish.

THE COURT: I don't know how it figures out in the record. I don't know, it wasn't spelled out and I am not sure the reporter knows it.

MR. SHEEHAN: I will submit it separately.

MR. WHITE: To the extent it is what he says, and there is not something laden in that other than these people are family, the allegation that these people talk to each other. You have to be kidding me, that is the basis of suing someone for $300 million for publicly humiliating them and saying they are were active participants in an ugly scheme like this? They talk to each other because they are family members. By the way, the allegation that they talk to each other is not in the complaint. It didn't get in there.

I would like to know what basis for the imputation that Mr. Sheehan talks about that they plead because if all it is, people in families talk to each other it seems to me that Mr. Sheehan needs to or the Trustee needs to know some more about the Chais family before they could make that allegation.

THE COURT: Well, his argument is that the complaint is sufficient enough to embark on appropriate discovery.

If he fails in the discovery, then he is exposed to a plea for summary judgment. So what we are really dealing with today is whether there is enough here to embark on appropriate discovery. Family relationships as an inference is pretty strong in that regard.

To look into those family relationships may be that sufficient pleading here that suggests discovery is appropriate under those circumstances. He may never succeed in showing that these people were nothing more than distantly related people on the street that got the largess of Stanley Chais just because he felt like doing something good for someone.

On the other hand, a family relationship and bond might be strong enough to create the inference that there is this relationship.

MR. WHITE: Well, Your Honor, I think we have come to a sad day, frankly, by the fact that you are related to someone would allow a quasi-government official, if you will, to force you to the burden of explaining in a public place your family relationships. There needs to be a basis for saying these people knew, and the fact your father is whoever he is, is not a basis standing alone for that or even the proper basis for an inference or pleading.

THE COURT: It may very well be that you are correct, but we shouldn't be doing that until there is some discovery.

MR. WHITE: I think you have to plead something and have a good faith basis for pleading it. These are things that are missing in the claim. The fact that you are saying they are in the family, it is not that

sort of basis. I would be very disappointed to find out that I could be held responsible for what my father did on the way to work this morning, when he had a car accident.

THE COURT: The fact is you are not going to establish it.

MR. WHITE: There is a huge expense involved in this kind of discovery that the Court is contemplating. My clients lost all of their money just like all the other victims that Mr. Picard represents, and for them to have to defend what seems to be a lawsuit not based on much more than or other than association, which is like we would like to say, is not a basis in the American system for proceeding, thereby a basis for putting people to the burden of defending this kind of a lawsuit. The Trustee needs to come up with something more, whether the source of the money, meaning whether it came from Stanley Chais or some other person is irrelevant to the purpose of a fraudulent conveyance. The question is what happened in the accounts between Madoff securities on the one side and my clients on the other.

The fact that the source of that funding of those accounts came from Stanley Chais is not related to that inquiry. The idea Stanley Chais felt akin to them and gave them money is not part of the fraudulent conveyance analysis. That is a question of showing if that

was intentional and people knew what was going on. If it is constructive that reasonable people would have noticed it. It is a relationship between them and Madoff Securities, not between them, their father and Madoff Securities.

I would urge the Court to look past that.

Beyond that, Your Honor, I don't think I have anything further to add. At this point I guess we will rest and move on to the next motion.

MR. SHEEHAN: I have one brief thing to say just in response to this. It will take only 30 seconds.

Sometimes in the course of the argument we seem to lose our way, the basic principles. This is a motion to dismiss.

We allege Stanley Chais stole hundreds of millions of dollars. We alleged that is all fictitious profits. We have alleged that all those accounts, dozens and dozens of those accounts in the name of his clients, it's not their money, it is other people's money, they didn't lose their money. They lost money that belonged to other people. That is all alleged and that is all true for the purpose of this motion. That alone sustains us today. All of the others, it is just power techniques asserted with this at this point, but the basic principle in this case is the allegation of hundreds of millions of

dollars being taken away from other people and the Trustee seeks to get it back.

Thank you, Your Honor.

MR. WHITE: I have one more thing. If we could finish up with my people, first Tracy.

On the agenda is the motion we made by Mirie Chase to dismiss for lack of personal jurisdiction. This will take about 20 seconds.

The bottom line is this woman had an account in Madoff. She is an Israeli citizen who has no contacts otherwise in the United States.

Apparently on the issue of what personal jurisdiction is, while Stanley Chais was her agent, we are led back to the question about agency, of course not found in the pleading. It is the burden of the plaintiff to lay a basis for proper jurisdiction. None has been alleged here, Your Honor.

The theory argued in the motion, in the papers in opposition is inconsistent with the basis alleged in the complaint.

So, Your Honor, on that basis we would say Ms. Chais ought to be dismissed in the case for lack of personal jurisdiction.

MR. HIRSCHFIELD: Good morning, Your Honor. Marc Hirschfield, from the law firm of Baker Hostetler, on

behalf of the Trustee.

This is not the first time in this case that Your Honor has had the chance to consider personal jurisdictional issues.

In fact, Your Honor, just a few months ago the Court issued a ruling in that context of another of the Trustee adversary proceedings that ruled upon a motion to dismiss for personal jurisdiction.

That was in Picard v Cohmad, and reported at 418BR75.

In that decision the Court overruled the motion to dismiss of two Swiss entities and found that the Court had jurisdiction over them.

The standard is set forth in Your Honor's ruling, so I won't repeat it here today, but the Trustee easily meets that burden.

As a matter of fact, the facts are just as compelling if not more so than the case in Cohmad. Just briefly the facts are these.

Mirie Chase -- and I would note that in Madoff's records Mirie is spelled M-I-R-I-E versus M-I-R-I. But these two accounts in BLMIS the first was opened in her name and what we think was her Social Security number and her address in Israel. There is a checkmark in the box of agency and it has Stanley Chais' name as being her agent.

Based on that, we could infer that we have alleged that Stanley Chais is her agent.

Over the five-year period that Mr. Chais maintained this account there are at least 11 transactions in the account. Money came in and money went out and there was a transfer to another account, which I will get to in a second.

One of the transactions I mentioned was a check was made payable to Ms. Chais personally, a $20,000 check in April 2003, and in all this account was a net winner of more than $288,000.

Let me mention a transfer out.

Well, in November of 2004, Ms. Chais transferred $340,000 out of her account and closed it. It was transferred to another account, with her husband, Mark Chais, who I should mention is her husband, and Mark Chais and Stanley Chais' son. So she is Stanley Chais' daughter-in-law. That joint account was held in her name and her husband is as joint tenants.

That account had a spectre of transactions, more than 50 transactions in totalbetween the time she became a joint tenant in the account when Madoff collapsed in 2008.

As a matter of fact, that account was a net winner of 13 and-a-half million dollars.

So based upon these facts which the Court on a motion to dismiss on jurisdictional grands treats that as true, the Court has clear jurisdiction over Mr. Chais.

As I said, the Court in Cohmad cited a standard. I won't repeat it here. But clearly, the allegations are that Ms. Chais' conduct was such that it relates to BLMSI and her actions do and, therefore, the Court has specific jurisdiction. It is clear she is acting individually or acting through her or through her husband directed transactions in these accounts. This is not a bad investment.

Certainly Madoff would from time to time give money out to people who would ask for it, but you would have to ask for it, he didn't give money out indiscriminately.

Clearly, the fact there were redemptions and transfers, someone had to ask for them. Ms. Chais said she did not personally ask for them, and I don't know whether that is true or not. We did not have discovery yet, either she or someone acting on her behalf did because we know the money came out.

Once we get a prima facie case of showing that we had the jurisdiction they had the burden of going forward showing they don't and they have not met that burden.

What the court also has to do is to look to see whether jurisdiction is reasonable under the due process grounds for the same reason that the Court found in Cohmad we found it is reasonable to exercise jurisdiction, that is equally applicable here.

One thing I want to note is that is not in our papers. In the Cohmad decision Your Honor is citing your prior decision that was reported at 63-BR422, it was noted that it is possible for a person to waive jurisdictional issues and, in fact, filing a notice of appearance could do that.

Well, in fact, the notice of appearance was filed on behalf Ms. Chais, is Mirie Chase as a party. In docket 13 in the case a notice was filed on her behalf as well as other defendants represented by counsel.

On that basis alone we believe the Court properly could exercise jurisdiction here.

For all these reasons we think the Court clearly had jurisdiction and the Court should exercise good judgment and allow this lawsuit to go forward.

Thank you, Your Honor.

MR. WHITE: I have a two points to make, Your Honor. One, with regard to the stipulation and the waiver, I have never heard of this before.

I recall this was an issue for us at the

time we were entering appearances. I need time to go and check the records because it certainly was not the intention on our part because we were aware of this issue at the time we were doing that. So I am caught unaware at this time by that argument.

The other point that I would like to make to the Court is Mr. Hirschfield spoke about how it is not a passive role. Mrs. Chais has said it is a passive role, that she does not ask for or direct any activity with regard to these accounts.

There is nothing in the pleading to the contrary, Your Honor. Again, you are asking for things that are not in there to fill in the gaps that could have easily been plead properly.

So from there we say, Your Honor, that the Trustee has not met the burden.

MR. KLESTADT: Good morning, Your Honor. Tracy Klestadt, from the law firm of Klestadt & Winters. We represent Michael Chasalow, and have filed a separate motion to dismiss.

Your Honor, on the 51-page complaint, only paragraph 38 mentions Michael Chasalow. And if I may quote for the record it is the fourth line:

Defendant Michael Chasalow is a person residing in Los Angeles, California. On information and

belief Michael Chasalow was the husband of Emily Chasalow. On information and belief Michael Chasalow is the registered agent for the Brighton Company (phonetic) and for his family foundation and an officer and/or director of Onedaga, Inc. (phonetic).

Your Honor, that is the only mention Michael Chasalow in the entire complaint. Michael Chasalow's name does not appear in the schedule of transfers because we received no transfers.

Your Honor, this is a perfect example, as Mr. Sheehan is referring to earlier, of a complaint that does not provide a road map for allegations against Mr. Chasalow because there are no allegations of fact against Mr. Chasalow.

Mr. Chasalow happens to be a respected professor of law at the UCLA law school. His finances are separate from those of his wife.

He is not alleged, Your Honor, to be a Trustee of any of the family trusts. There are no factual allegations that he received any funds or that he directed the transfer of any funds.

He is not alleged to be an immediate transferee or subsequent transferee.

In the response that was filed by the movant there is a statement alleging that Mr. Chasalow may

have had joint control or access to joint accounts but it is not pled in the complaint. This is a situation where the assertion is guilt by association or guilt by family relation.

There is no factual allegation in the complaint whatsoever, Your Honor. This is no road map and, I believe, Your Honor, it does not meet the requisite detail of pleading anything to survive our motion to dismiss.

I would request Your Honor to entertain our motion.

Thank you.

MR. HIRSCHFIELD: Good morning, Your Honor. I am still Marc Hirschfield from Baker Hostetler, so far as I know.

In a nutshell, Mr. Klestadt argues that because Mr. Chasalow does not have his own account at BLMIS he could not be held liable in our complaint. This is a very narrow and impermissible view of the law.

In fact, the complaint alleges that Mr. Klestadt mentioned that Mr. Chasalow is related to Emily Chasalow Chais, Stanley's daughter and he is a registered agent for the Brighton Company, and is either an officer of director of Onedaga and the Chais family foundation. These entities withdrew millions and millions of dollars from

BLMIS and Emily had at least 11 accounts at BLMIS that is either an account holder or beneficiary for, and they withdrew more than $51 million since January of 1997.

The complaint does allege that all but one of those accounts after 1998 went into a bank account for Emily Chais.

Now, I will get back to that in a second. The Trustee has alleged facts that show Mr. Chasalow's relationship to various entities that are named in the complaint.

We have the right to seek the return, the avoidance of return of transfers to initial transferees and subsequent transferees.

We have had no discovery here at all, as Your Honor knows, and we are entitled to discovery to find out exactly which transfers may have been gone to Mr. Chasalow.

We know that some did -- and I will get to that in a second -- but we know for a fact that some did.

The complaint does put him on notice we are seeking in paragraph 166, the return of payments of commissions or fees of transferring from one account or another or by some other means.

Clearly, Mr. Klestadt knows he is being sued for fraudulent transfer and that is either as an

initial transferee or subsequent transferee.

I mention that discovery here is appropriate. At the time we filed the complaint we have information as to where Mr. Chasalow may have gotten transfers. We have since learned, on at least one occasion, that $6.4 million from Emily Chais, she withdrew from BLMIS went to a joint bank account with Mr. Chasalow. So clearly it went to a joint bank account, where he had control over those funds and would be an initial transferee.

Had we not found this out independently we could not have known it or alleged it. At the time we filed the complaint we didn't yet know that. By discovery we will found out exactly which transfers Mr. Chasalow had gotten as an initial transferee and which ones he got as a subsequent transferee.

Clearly, the complaint lists a slew of transactions, and he has exclusively knowledge of, which monies he may have received.

It is not appropriate to hold a Trustee to a burden where he can't make allegations because he is not taking discovery and does not have the information. The information is in their hands and they know it. We will learn it through discovery. We would submit that the reading of the law presented by the defendant here is

impermissibly narrow and we should be allowed to go forward with discovery and to establish which transfers Mr. Chasalow got through discovery as the initial transferee and which funds he received as a subsequent transferee, and then seek to avoid those transactions.

Thank you, Your Honor.

MR. KLESTADT: Just very briefly, Your Honor, the complaint does not say that.

THE COURT: -- well, that is true, the complaint doesn't say it. The brief does. I have looked at the brief.

All these new facts are in there. I could just say I grant your motion with the right to replead because I think the new facts do justify sustaining the complaint. This could be a waste of time, but if that is the way it ought to be, I could do that.

MR. KLESTADT: I think given the fact they have lumped my client in with this --

THE COURT: Now, you have separate facts that bring your client into the focus of the Trustee's complaint.

MR. KLESTADT: We may warrant a separate motiion, so the Court may focus on what specifically would be applicable or not applicable to my client.

THE COURT: As I say, I could grant your

motion but that just brings us back to unless you could stipulate and direct the Trustee to replead with respect to your client, based upon the old facts and the new facts that have been admitted in discovery.

MR. KLESTADT: I could take that up with my clients. We raise that issue and, in fact, we raised the issue of the Trustee repleading the case, but that was rejected.

THE COURT: That would save everyone in the case a lot of time and effort if you would let the Court know.

MR. WHITE: I think we need a change of personnel, now, Your Honor.

MR. KLESTADT: May I be excused, Your Honor; I have an 11:30 before Judge Gonzales?

THE COURT: Go ahead.

(Brief recess.)

MR. HIRSCHFIELD: Judge, one thing before Mr. Eyre argues the motion to dismiss the counterclaims.

Counsel has asked me to withdraw our reliance on the pleadings on the appearance as a basis for jurisdiction. We did not give him a copy of that last night and we apologize for that. We will withdraw that argument. It is what it is.

MR. EYRE: Your Honor, may it please the

Court, Paul Eyre, from Baker Hostetler, representing the Trustee.

We have a motion to dismiss the counterclaims filed by Stanley Chais, the father, his wife, Pamela Chais, and various Appleby entities that are controlled by Pamela Chais and the 1991 Chais family trust.

Those entities, Your Honor, answered the complaints and filed a four-count counterclaim.

The four counts of the counterclaim are tortious interference with business relations, conversion and the Fifth Amendment count that is some form of due process for the denial of counsel.

All four counts are predicated on one single act.

That is, Your Honor, the act of the Trustee in sending a letter to Goldman Sachs on March 6, 2009.

A March 6 letter was sent to Goldman Sachs, among other entities and basically that letter was sent to put Goldman Sachs and others on notice of the Trustee's position regarding assets that they may have obtained directly or indirectly from BLMIS.

Your Honor, it was also in the letter, the letter was also sent to put Goldman Sachs and others on notice of the automatic stay.

The letter was sent pursuant to the

Trustee's exercise of his fiduciary duties. In fact, some would argue his obligation to send the letter to assist him in marshalling the assets that would come into the estate and be distributed among those individuals who lost millions of dollars.

This is not the time for me to give the opening statement on Stanley Chais. I will resist that urge, Your Honor. The Court has heard enough about Mr. Chais' relationship going back 30 years with Mr. Madoff, it's been a close association.

I will however briefly explain to the Court that the money is what is in the counterclaims, they are complaining of the access of money. The way the money worked at the end was really quite simple.

The money would come out of Madoff, and it would go to City National Bank in California.

City National Bank in California would then have two buckets, or at least it was essentially two buckets.

One bucket was for Chais family, all the entities that are Stanley Chais, his wife, his children. All those entities.

The second bucket was called the arbitrage. That was what it was called by Madoff. But that is three entities, Pompom (phonetic), Landover and Brighton. They

are entities in California where investors, people come into these entities and for 30 years, or more than that, perhaps, Stanley Chais was the one that these investors gave their money to. He, in Your Honor, would give the money to Madoff.

There was only a brief time when Stanley Chais did not have that role. That is when he was sick. I believe he went to Israel for a period of time and installed his son Mark as the individual in charge of Pompom, Landover and Brighton.

In any event, the money would come out and be disbursed and money would actually go back to Stanley Chais as his percentage of the Pompom, Landover and Brighton. If they did well, above 10 percent, which they always did, he got a particular account.

Money would also go from City to an account that Mr. Chais had at Goldman Sachs and that is in two parts. One I will call the liquid account, it has the liquid assets. The other is partnerships, real estate partnerships. So what happened here is, and it is very important for these counterclaims that there is no allegation, none, that the Trustee took money, that the Trustee took property, that the Trustee exercised control over any account.

There is no allegation, in fact, that the

Trustee had the power, had the authority or in any way stopped money from going out of Goldman Sachs to Mr. Chais.

What happened is as follows. The Trustee sends a letter and the Court I am sure is aware of these types of letters.

In that letter, the Trustee details his legal position, relies on statutes. He spells out the statutes.

He cites case law, Your Honor, and he says this is our belief as to the current situation.

Goldman Sachs then makes an independent decision, or it's apparently an independent decision, to not allow money to go out to Mr. Chais.

That was a decision, Your Honor, that Goldman Sachs made. These counterclaims also claim that because the letter was sent, Goldman Sachs was caused to do something.

I submit, Your Honor, that is facially implausible for a number of reasons. Number 1, as Mr. Chais is fully aware, there were millions of dollars potentially owed on those real estate investments. And what has been happening over time, as Madoff gave the money to Chais, Chais was able to use that money to make his capital calls to Goldman.

When Madoff dried up, I am positive that

Goldman Sachs considered its own position and decided, gee, we better worry a little bit about the pocket of money sitting here, in case Mr. Chais is unable to make a capital call.

So Goldman Sachs itself decides they won't allow the money out. Now, in fact, just so we are clear, in fact, and this is important, money has gone out. Plenty of money has gone out.

The Trustee even after the receipt of the letter sent a letter to Goldman Sachs saying: The Trustee agrees for money to come out for living expenses, medical expenses. In fact, as Your Honor knows, in September of 2009, Mr. Chais filed a motion to the Court, an order to show cause. We countered with a TRO.

There was an agreement reached, a consent decree reached at this point, a consent order that basically establishes a system for money going out for counsel fees, for medical expenses, for living expenses. So all of that is ongoing at the moment.

Getting back to the letter itself, I think everyone now, and by everyone I mean certainly the Chais entities and the Trustee, by which the Chais entities conceded that the sending of the letter itself would not be a tortious act. And I think they would agree that the sending of the letter would not be a tortious act. That

is consistent with a number of cases cited in our brief. The Kush (phonetic) case indicates, Kush must also establish that the Trustee intentionally interfered with the performance of her contract without an economic or legal excuse or justification.

The recovery for a tort is not allowed absent a showing that the defendant intended to harm the plaintiff without an economic or legal excuse or justification.

I believe that in their papers that Chais has conceded that is indeed the sending of the letter is indeed what the Trustees are required to do. That is part of their job to marshal assets. So the actual sending of the letter we believe, and I think it is conceded, cannot be a tortious act. The Chaises go on to say that perhaps we conceded that, but the letter itself contained a misrepresentation. As best I am able to tell, they claim that the letter misrepresents the definition of customer property under 78fff2C3.

I will not argue that issue here today. The Court is well aware of the Trustee's position, that indeed assets sitting at Goldman Sachs on behalf of Mr. Chais is customer property.

But regardless of that argument, Your Honor, there could be no question that the Trustee acted in

good faith, good faith belief and that it was legally justified in sending the letter.

The argument on Goldman Sachs is also that it is facially implausible that Goldman Sachs upon receiving the letter of the Trustee would not do its own work, would not consider itself its own legal position, would not examine its contract, would not do the things that a Goldman Sachs would normally do.

In fact, when you read the counterclaim it becomes obvious that one of the reasons the counterclaim fails in addition to what I just stated. Is that there was no breach.

You can't have a tortious interference with a contract, if the contract itself was not breached.

There are many references in the counterclaim and in the document filed by the Chaises that reference the agreement with Goldman.

We believe Your Honor can indeed look at that. It was not attached to the counterclaim, but it was attached to our papers.

This document it is very clear, Your Honor, that Goldman Sachs reserved the right on its own to withhold funds. There was no breach. There has been no breach of this contract.

From March, the receipt of the letter by

Goldman, until September of '09, Goldman could have been sued by Chais. Chais could have come to this Court. Goldman could have come to this Court. A lot of things could have happened, and none happened until September of '09 when Chais brought a motion before the Court and we reached an agreement.

Even if, for argument's sake, you could make the argument that the Trustee misrepresented the law in a letter that was his business judgment to send, and even if you could argue that the letter caused Goldman Sachs to breach a contract, which, of course, they didn't breach, but even if you could make those arguments, we believe further that the Trustee is immune from a lawsuit for the sending of the letter.

While we concede that the immunity is not total, there is a qualified asset in the community, but I can't think of a more relevant thing that a Trustee can do such as sending this letter that should be protected by immunity.

I mean one could -- the argument has been made, well, if he intentionally misstated something, if it was a mistake he abrogates immunity.

If everything the Trustee said in the letter is true, which we believe it is, you don't need immunity. The reason trustees get immunity is for a

mistake, and you don't need that if everything the Trustee is doing is absolutely correct.

In hindsight to go back and you said you abrogated immunity because we conclude your definition of customer property is not the definition we believe to be the case, I think it misses the point entirely.

I think that the Chaises go on to say, and, I believe, this is true, they then make the argument, well, maybe by a mistake, maybe if the Trustee made an honest justifiable mistake, he doesn't lose immunity but he will lose immunity if he intentionally did something, if he intentionally did something in the letter to misstate the law.

I have a number of responses to that, Your Honor. The first is that there is absolutely nothing in the complaint, nothing, that alleges facts that this Trustee intentionally misstated something in a letter to try to get Goldman Sachs to do something.

Your Honor, there is nothing in the counterclaim other than the bald assertion that the Trustee intentionally did something. That is a legal conclusion and, I believe, the Astroff (phonetic) case in 2009, and the other case makes it very clear that is not acceptable.

Furthermore, it appears to me anyway, if a Trustee, if the argument is, well, the Trustee tried to

fool Goldman Sachs by mistakenly putting a wrong law in that you have actually put the cases in, you have put the statute in, the causal connection between that letter and Goldman's actions must indeed fall.

This is Goldman Sachs. If anyone truly believes that the Trustee is deliberately and intentionally trying to fool Goldman Sachs into doing something they otherwise would not do, the Trustee doesn't put in their cites to the cases, all the things the Trustee did not.

I think that is facially implausible. I think as the Court is well aware, facial implausibility does matter, it does matter in a complaint.

There are two other counts. The count for conversion, Your Honor, basically, it seems to me that we took something, that the Trustee took something.

There is nothing in the complaint at all, nothing, factually that would show the Trustee took anything, had control over anything because he did not.

The only act he is accused of doing is sending the letter. That is the act. The act of sending a letter cannot control an account that is held at Goldman Sachs by Mr. Chais. That can't follow.

I think the conversion fails also.

One thing I failed to mention is even if the Chaises were able to overcome the immunity, even if

they were able to overcome the causal connection, all those things that I believe are reasons for the counterclaim to fail, the actual statements in the letter itself are privileged.

There is plenty of good law that says when a Bankruptcy Court appointee sends out various things, various letters, the content of those letters are privileged.

The Chais defendants tried to distinguish those cases. What they say is, well, that is true if the statements in the letter constitutes defamation and/or the letter is going to someone who is part of the judicial proceeding. They said those are the only two times that you get the privilege.

I found nothing in the case law, nothing that supports the notion that it has to be defamatory, or could only be letters that go to the proceeding that would allow you to have the privilege.

I believe the privilege would extend to the content of the letter. That is a further reason that the motion to dismiss should be granted.

The last count, Your Honor, is the Fifth Amendment claim. As I best understand it, it is as follows: It appears that the argument is that Mr. Chais was denied access to counsel, counsel that Mr. Chais has

had, the law firm of Loeb & Loeb, for a good 30 years.

They are counsel that has been paid out of the assets. As I understand it, it has been paid regularly. The Trustee has agreed pursuant to the consent decree to agree that money will go to pay legal fees.

Furthermore, and I think the fact of the matter is he has always had counsel, he has always had it all along. I think it is also important, and I don't want to get hung up on it, but it is true in a civil context that the defendant is not necessarily denied access to counsel if he has the right at all for access to counsel, but it is also not a situation where he simply gets the counsel of his choice. That is not what the law requires.

The other argument, and I wouldn't belabor the point, the Trustee is not an estate actor doing something unconstitutionally to Mr. Chais. He cannot do that. He is not an estate actor.

I could argue further, but to sum it up, I basically say, I think this has to be conceded, the only thing in the complaint that this Trustee is accused of doing is that which every Trustee must do, which is attempt as he knows best to be able to do to marshal the assets of those people like the Chaises, who have taken out hundreds of millions of dollars.

The Trustee has an obligation to try to get

that money back. He is doing what a Trustee has to do.

If doing what a Trustee has to do subjects a Trustee to counterclaims of the sort here, the counterclaims for conversion, counterclaims for tortious interference, counterclaims for a violation of someone's due process right, I would submit to the Court that we would have a very hard time, having not done its job.

Thank you very much, Your Honor, I appreciate it.

MR. LICKER: Good morning, Your Honor.

THE COURT: Good morning.

MR. LICKER: Eugene Licker with my colleague, Walter Curchak, from the law firm of Loeb & Loeb, on behalf of the defendants, Stanley Chais, Pamela Chais, Appleby Productions Ltd, and some of its related entities.

Going last has a lot of drawbacks, Your Honor, and it only has one benefit. It allows me to make some commentary on what went on before, including the argument I was not a part of.

As Mr. White says there is a point where Mr. Chais' lawyer comes out, and we have denied the allegation in the complaint that has been submitted in the answer that is before you today. The answer, the allegations which are taken as true for the purpose of this

motion.

The second thing I would say, Your Honor, with all indulgence and apologies to the court reporter, the noun that best describes this matter, I don't believe is mishpocha, but I would choose mishigas. On that note, and I have given her the spellings, my best guess of spellings on those.

I want to address what Mr. Eyre just had to say. With all due respect, I would ask you to dismiss virtually all of it. I have been doing this for 30 years, and I have to say that this is the first defense of a motion to dismiss that I heard that went so far into the facts, and really at this point what I found to be the Trustee's approach to this entire case.

So when Mr. Eyre gets up here and says I wouldn't rehash the allegations against Mr. Chais, if you recall in his opening brief, he did just that.

He, essentially, asked Your Honor to take as true not the pleading that is before Your Honor on this motion, but his pleading. And even if we were assume that Mr. Chais has done all of these terrible things and frankly, there is not all that much in the complaint that is plead specifically anyway, it is all paragraph 1 of 3 in there. It's all in one paragraph.

He has asked Your Honor to accept his

allegations as true rather than those in the counterclaim. Now, as Your Honor well knows, this is a motion to dismiss. The issue before the Court is not whether we prove our claims, but whether we stated our claims, and it is our pleading that is accepted as true.

So when Mr. Eyre goes through and tells you how the Goldman Sachs account works, how monies were transferred to City National Bank, leaving aside the fact that Mr. Eyre is testifying on the basis of pure hearsay, leaving aside he is not under oath, leaving a stipulated fact that some of things he has presented as the facts are wrong, it is all irrelevant. It is all not competent commentary on this motion. This is a motion to dismiss the counterclaims.

I would ask that Your Honor ignore what Mr. Eyre tells you about the millions and millions of dollars.

THE COURT: That is not the real issue here. You, I, and Mr. Eyre, know that this matter and these allegations in the counterclaim come before me and it's not for the first time, but there is also a history. This Court has presided over the litigation involving the Goldman Sachs account, and the consent order with respect to it.

The real issue here is whether the sending of that letter was a tortious act and the impact of that

and the freeing of the account, is the freeing of the account an act of volition on the account of Goldman Sachs that was triggered by the letter or not.

The account frankly was frozen, not by the Trustee, but by Goldman Sachs.

I think the law will acknowledge that Goldman Sachs is a pretty sophisticated target when it comes to someone claiming an improper or tortious act, and makes its own judgment as to whether or not it is appropriate to freeze the account.

I think we can conclude that Goldman Sachs made a judgment on the account.

MR. LICKER: Right, Your Honor.

THE COURT: Whatever its thinking was, I don't think it is relevant here.

MR. LICKER: Whatever its thinking was?

THE COURT: Yes.

MR. LICKER: Whatever Goldman's thinking was?

THE COURT: Yes. You will have to assume it has done due diligence.

MR. LICKER: Yes.

THE COURT: And you cannot assume that Goldman froze the account out of ignorance.

MR. LICKER: I don't assume anything.

THE COURT: These are real issue before me and I agree with you, I don't care about all of the other issues. But it does come before me with somewhat of a history involving the utilization of the money and a lot of things that are contained in this counterclaim.

MR. LICKER: But very much to the point, Your Honor, I don't know what went through Goldman's mind. I know what would go through my mind if I were counsel to Goldman and got this letter, and we will talk about the contents of the letter in a minute.

But that is what trials are for. We will find out what went through Goldman's mind. We will find out whether Goldman read these cases and said, you know, that Baker Hostetler, those people were pretty smart and got it right or they may have read those cases as we did and said, you know what, the guys at Baker Hostetler got it wrong.

THE COURT: This is not a lawsuit against Goldman Sachs, but the Trustee.

MR. LICKER: It is not --

THE COURT: Perhaps under the old theory it should be.

MR. LICKER: Every tortious interference case, Your Honor, has two culpable parties. When A induces B to breach a contract with C, B has breached that contract

and is susceptible to, but it does not mean A is not.

The question is did the letter that was sent start a chain of events, of which the inevitable result was Mr. Chais would lose control of his property and the answer is yes, that is what we allege and we will show at trial.

Let me read to you, if I might, Your Honor, just a small portion of this letter. We will ask ourselves is Goldman Sachs just deciding for itself without any liability, any culpability on behalf of Mr. Picard or is there something else going on.

It is the last substantive paragraph, but not the last paragraph, and it is important because -- I will read the last paragraph:

This letter places you on notice, (if you were not already on notice), that because the funds constitute, "customer property," not because we think that, but because they do and, therefore, property of BLMIS pursuant to SIPA, the Trustee will presume that any further payment or disposition of the funds by you, whether or not at the direction of your customer or depository, will, not might, will be deemed a willful violation of the automatic stay by the Bankruptcy Court.

You are hereby instructed to refrain from engaging in or permitting any transfers or dispositions of

the funds or other monies received from BLMIS without an order of the Bankruptcy Court.

Your failure to abide by this instruction may subject you and/or the transferee to liability under 11 U.S.C. sections 549 and 550.

In addition, any such transfer or disposition may be deemed by the Bankruptcy Court to have been made in bad faith and your liability may include sanctions.

Final paragraph, Your Honor. Please contact me as soon as possible for discuss compliance with this letter.

Signed Lauren J. Resnick, on behalf of Baker Hostetler.

Your Honor, yes, Goldman is smart people and they have smart lawyers and they read this law, and they could have decided not to be intimidated by these bullying tactics but they did not, they did not.

The letter, and we will talk about the substance of the letter in a minute, is wrong. The letter does what Mr. Picard has done, vis-a-vis Mr. Chais from the start, which is to presume guilt.

The letter leverages off of loose language in cases that utilize a legal fiction to align the SIPA statute and Bankruptcy Code so as to avoid technical

defenses.

It says to the Goldman Sachses of the world, the money that you hold, irrespective of what we prove, we have not proved a thing, without a stroke of a judicial pen, the money that you hold belongs to me, Irving Picard. It does not belong to Stanley Chais.

That is not true, Your Honor. What is true is the Trustee believes he can prove that is his money, that he is going to -- and this is in March -- he is going to interpose a complaint, he did in May, and he says he will win and maybe he will, I don't believe so but maybe he wins. And when he wins, then it is his money. But what he was doing in March of '09 is taking that money, taking dominion and control of that money. And contrary to Mr. Eyre's comments, the conversion claim says he took dominion and control over that money, and that is the element of conversion. He just took control of the account:

Please call to discuss compliance, please call me so I will tell you, Goldman Sachs, what to do with the account.

There are lot of lawyers in the room. If Goldman came to them and said what should I do, it is no-brainer, don't give Stanley Chais the money.

Why? What if the letter is wrong? So

what? You want to put up with a lawsuit and pay a lawyer to defend. No. As night follows day, Goldman did not only what Mr. Picard knew what they were going to do, it is what he intended them to do. That is why he sent the letter.

On this motion to dismiss, Your Honor, we are not here to resolve the facts but to talk about the arguments. Let's talk about the argument that Mr. Eyre raises here.

First, it is Mr. Picard's duty to marshal assets. He said we have conceded that. I don't know it is his duty to send letters but it is his duty to marshal assets. I have no problem with him sending letters, telegrams or e-mails. All he has to do is get it right and not wrong. He has to not take my client's property.

But whether he was acting in good faith, whether Goldman took the time to read those cases and decided for itself what to do, those are all questions of fact. That is what trials are for, not things that are cognizable on a motion to dismiss.

Is the letter true or false? We will have a trial about that. We will find out whether the letter is true or false. But I would argue that the letter very clearly is false.

What the Trustee has done is taken solace

in language in Park South, Hill 1 and Hill 2, that creates a legal fiction.

And we could talk about it but it is very clear the legal fiction is for purposes of standing because of the language difference between SIPA and the Bankruptcy Code. That is it.

As the Second Circuit said in Colonial, and that was not a SIPA case, but it does not matter at all to this point. The Court says if it were the case that the property in the hands of the third party were property of the estate, then you would not need to bring an action for the Trustee to get it back. You would just take it back. It is his property.

The cause of action, says the Colonial Court, is the property of the estate, not the property itself.

It still has to go through the process of convincing you, Your Honor, that it is their property. That is the step they skipped.

By skipping that step, Your Honor, they have harmed our client. If was certainly Goldman Sachs that pulled the trigger, but it cannot be said that language in that letter is merely the Trustee stating his opinion and saying to Goldman, you do what you want. It is clear what the intended and the probable result of

sending that letter would be.

But, Your Honor, that is what we are going to prove at trial. Is the Trustee immune from suit? No it is not. The truth is that he is immune for the exercise of business judgment and this is not a business judgment. It is not a decision of when to sell or what price to sell. This is writing a letter, taking a position that is legally bankrupt and because of that, causing harm to a third party.

Whether it is exercising business judgment, though, it is a question of fact. That is why we have trials.

Is the letter privileged? I would have to say this is one of the most creative arguments I have heard in a long time. But it is also one of the most vacuous. The notion of privilege and I have litigated a number of defamation cases, and I believe Your Honor has seen many more than I have litigated, the notion of privilege is unique to two causes of action, a cause of action for defamation and for malicious prosecution. Why? Because of the nature of those actions in a lawsuit, you are always putting someone's reputation on the line. You are saying that someone did something wrong.

If you don't privilege those matters, then no one could ever sue for defamation. That is why it

adheres.

The Trustee cited no case outside of the defamation context, with two, well, one exception and one case that they say it is an exception. The latter is the Weisman case, which grows out of the OPM leasing, where Weisman's older brother, Mordecai, sued the trustee. There were three sentences. It's in the absolutely wonderful report that's reported by, and I am sure Your Honor is very well familiar with it.

THE COURT: They are still making money in selling the examiner's and Trustee's book.

MR. LICKER: You can get it for free.

THE COURT: Can you? The bound copy is about hundred and some-odd dollars.

MR. LICKER: Is that right?

THE COURT: I don't get any --

MR. LICKER: It is absolutely wonderful, I keep it on my shelf at all times. I think it is the best written book on fraud that there ever was.

In the report --

THE COURT: Just, as an aside, when you talk about fraud and Madoff, it's kind of sophisticated or unsophisticated. The OPM fraud was essentially taking a glass cocktail table, putting a contract on the table, a flashlight underneath it and then forging the signatures.

MR. LICKER: The image of Mordecai Weissman with a flashlight on the table and then where it is filled in is etched in my mind. It is a wonderful case.

THE COURT: It is also interesting one of them ending up marrying the photographer?

MR. LICKER: I don't know.

THE COURT: We don't know for sure about the sex of the photographer. It would be interesting to find out.

MR. LICKER: I want to interview the -- I think Mordecai Weisman is out there, it is very, very interesting. His brother was mentioned as having a no-show job, and having complicity in the fraud. There were three sentences in a several hundred page report. He sued for defamation and tortious interference and the whole argument is you defamed me, therefore I can't do business anymore. It was a defamation case. That is all it was.

The only other case that the Trustee has found where the notion of privilege applies someplace else is a case out of California applicable to Section 47 of the California Civil Code that specifically privileges materials that are presented in Court. That is sui generis. It has got nothing to do with the case.

My favorite argument, which is the next

argument the Trustee makes, to the extent the privilege only applies to defamation cases. Well, this is a defamation case. The argument is it was about a letter which has a false statement, that is defamation, that causes an injury to the counterclaimant. Therefore, this must be a defamation case.

Your Honor, they left out the notion that the falsehood has to be about the plaintiff. This falsehood is about money and they have left out the part about reputation of damage. We are not claiming that. We are claiming other kind of damages, inability to access funds. This is not a defamation case.

Next, there is no breach. Why do we know there is not? Mr. Eyre tells us that. He is a very good lawyer. The fact he has read these contracts and he now tells Your Honor there is no breach, that is interesting but irrelevant. That is why we have trials.

Indeed there is a breach. There is nothing in any of those contracts that says any third party can decide when and if money could be released to Mr. Chais. But that is for trial. That is not on a motion to dismiss.

Finally, it is Goldman's fault, it is not our fault. Well, Your Honor, causation. If this letter had not made its way to Goldman Sachs, I guarantee you I

would not be standing here making this argument. We would not have been before you.

In terms of the elements of the various causes of action there are a couple of technical arguments that the Trustee makes in their reply brief. I want to address that because we did have a chance to do it on the paper.

We argue tortious interference with contracts and business relationships to the extent any of the relationships between Mr. Chais and Goldman is extra contract, that it is not dealt with by the contract, the Trustee comes back and says and this really epitomizes the Trustee's argument in this case, he comes back and says there is no allegation of malice. You have to allege allege malice, and they quote the statute, which means unlawful means or purpose. They say they have an alleged malice.

We have an alleged unlawful means, referring to the conduct of the Trustee for sending a letter that was untrue. That is what unlawful means.

We don't say that the Trustee hates Mr. Chais, that he has hatred or ill will towards him. But what we said was it was unlawful full means.

Mr. Eyre has misconstrued the constitutional argument of what is happening here. He is

remembering when the letter came in and we had some problems getting money out of Goldman Sachs. As you could imagine, Your Honor, I might have made it my business to mention all of this to Mr. Eyre and to ask him to reconsider. That would all go to good faith. That is factual, and not before you on this motion. Mr. Eyre is confusing what went on back then with what we are arguing now.

What we argued back then is, hey, you may be willing to dole out and make Mr. Chais come out to you and say, I need to see the doctor this week, can I have $100 to pay this bill, and you will say yes. You are not bad people or trying to kill the man. But they were not allowing us access to any funds to pay for the legal defense and it affected the legal defense. Yes, we stayed on. We wouldn't abandon the client. But it affected the legal defense.

But that is not what the fourth cause of action is about. It is very simple, Your Honor, under Intercontinental, you could have private actors that act as public actors who are subject to the state action restrictions. This is one of those situations and the government is not allowed to take your property, which in this case is control over this account without due process and that is what they have done.

This is not a Sixth Amendment argument, but a Fifth Amendment argument, and I want to make that clear.

Let me close with this. I was here for the first argument. I heard Mr. Sheehan very passionately argue to Your Honor about the thousands and thousands of victims of the Madoff fraud.

I can't say anything different. Obviously a lot of people were hurt here. I have nothing but respect and Mr. Chais has nothing but respect for the Trustee and his efforts to try to get money back to those people. That is a noble effort, and I am glad they are people who willing to serve.

I would suggest that nothing about this counterclaim will chill anyone's argument about serving in that capacity, in the capacity as Trustee. I think you have their fee application on the calendar for this afternoon that goes to that point.

But it does not give this Trustee or any Trustee carte blanche to skip the judicial process.

If Mr. Picard can prove that Mr. and Mrs. Chais and the Appleby entities, that all of our clients got money they did not deserve he will get a judgment out of Your Honor and it will be executable and they will recover. They have to do those things first, though, Your Honor.

What they have done here and what they

tried to do without the stroke of a judicial pen is skip Your Honor and go straight to judgment. It is pure Alice and Wonderland, punishment first and trial later. That they cannot do, and that is what the Trustee is liable for. We will try to do that at trial. We plead adequately the four causes of actions. It is fully before Your Honor, and that is why the motion must be denied.

MR. EYRE: I will make three brief points, Your Honor.

On footnote 8 of our papers we cite the fact that the Chaises reference the account, and the contract with Goldman Sachs in numerous paragraphs of the counterclaim. 179 to 182, 184 to 180, et cetera. It is also clear law, I believe, that a party should not be allowed to escape the consequences of its own failure to attach a document.

I believe the Court can consider that Goldman Chais agreement in a motion to dismiss and it does not convert that motion a summary judgment.

Secondly, the Chaises referenced the Weissman case, this case has to do with privilege. It says briefly: Under the law of New York statements that arise in the Court of judicial proceedings and are relevant and pertinent thereto are absolutely privilege.

The privilege protects statements

regardless of the speaker's state of mind, knowledge of falsity or the jury that the statements caused. The privilege embraces anything that may possibly be pertinent or which has enough awareness or connection with the proceeding so that a reasonable man may think it is relevant. All doubts should be resolved in favor of its relevancy or pertinency.

The third point I will make, in the letter that the Trustee sent to Goldman and others, there are two points about the letter that I would just like to just raise.

Number 1, the letter does not mention Chais in any respect.

The second point I would make is the letter, encourages Goldman Sachs to do its own work and its own due diligence, which they would do anyway, but the letter does say, your failure to abide by these instructions may subject you, et cetera.

It also says, in addition, any such transfer or disposition may be deemed by the Bankruptcy Court. The idea when you put "may" into this, I would submit Goldman Sachs would do it anyway, but the Trustee was encouraged in making its own independent assessment of the legality here and what they should do about it.

Thank you very much for your time, and I

appreciate it.

MR. LICKER: I am tempted not to say anything but I am a lawyer and I have to talk.

On the Weissman case, I am not sure what Mr. Eyre's point was, but it applies to something other than defamation cases, it went a little far. When Judge Cotell (phonetic) said immunity applies irrespective of the knowledge of falsity. There is a reason he use that phrase, because he was addressing defamation and this not a defamation case.

The letter speaks for itself. I will tell you what I would tell Goldman Sachs. If does not matter what we think Goldman Sachs was thinking. We will find that out at trial and at discovery.

This is a motion to dismiss. Thank you Your Honor.

THE COURT: There has been very little discussion about one very important document, which has been referred to, perhaps obliquely right now, but paragraph 29 of the customer agreement gives Goldman Sachs the complete authority to freeze funds at their own discretion, totally.

If you read the rest of that particular paragraph, they are a very independent actor, and what they do is to be construed as an act of their own volition.

And that may be a very important factor in my consideration of whether or not these counterclaims stand,

MR. SHEEHAN: Thank you, Your Honor.

MR. WHITE: Thank you, Your Honor.

MR. SHEEHAN: Your Honor, there is one last item here. Well, there are quite few of them, it's the fee applications and we have the Trustee and his counsel as well as a number of other applications.

(Brief recess.)

MR. SHEEHAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. SHEEHAN: This is a return date of a number of applications for interim allowance of fees on behalf of a number of parties.

There is only one objection that has been filed that I am aware of. That is in connection with the application of Mr. Picard and by his counsel, Baker Hostetler.

THE COURT: Well, there is a little reaction which doesn't really appear to be an objection to the fees but more to the substance to your rejection of a claim on the part of one Dr. Rudolfo Dawlt (phonetic) in Zurich, Switzerland, which if you would look at the way it is titled, it refers to today's hearing but it seems to

really regard this particular claim and Trustee's rejection of it.

So unless there is somebody who could clarify it, I don't regard this specifically as an objection to fees.

MR. SHEEHAN: Your Honor, I have that letter as well, I have it on my desk and I read it as you did. Even though it was captioned a claim, the letter was characteristically an objection to the claim. I turned it over to our rejection people and they are handling it.

With regard to those applications, Your Honor, not objected to. I won't go into them. I will go into a brief detail and I would identify the firms involved. A number of them are firms retained by the Trustee in connection with actions instituted in foreign jurisdictions.

The first is Schiltz & Schiltz. The next is Higgs Johnson Truman Bodden & Company, Eugene F. Collins, Willaim Barristers and Attorneys as Special Counsel, Attias & Levy, Lovells LLP and Kugler Kandestin.

I will leave these sheets with the reporter so she could have the spelling of these names, Your Honor. All of these, these are all foreign counsel and there being no objection, we would move those applications be approved.

I should note for the record that Mr. Bell

is here, ready to speak.

MR. BELL: Kevin Bell, for the Securities Investment Protection Corporation.

With respect to that cluster of special counsel, SIPC has filed one recommendation and supports the amounts requested by those various counsel and would support the entry of an order approving those requests, Your Honor.

THE COURT: Does anyone want to be heard?

Well, definitially, for the purpose of this proceeding, I am prepared and I do treat them as attorneys for the Trustee --

MR. SHEEHAN: Yes.

THE COURT: -- and they have the same standing as the attorney for the Trustee for the purpose of my granting allowance and in considering the position of SIPC.

MR. SHEEHAN: Thank you, Your Honor.

The other unopposed application has been filed by Windels Marx, who is here in Court this morning. Alan Nisselson and Regina Griffin are here today, Your Honor.

As you well know, Your Honor, they have appeared already before you in a number of capacities on behalf of the Trustee.

We have been working cooperatively with that firm in connection with a number of matters, some of which have involved corporations of which the Madoff family and other third parties had an interest.

Shortly you will be seeing complaints filed with regard to at least two of them.

In addition to them, there are a number of insiders where we have had conflicts because of their relationship to the corporate clients that we had. We felt it was remote but nevertheless appropriate not to be involved with those particular situation.

We have asked Windels Marx to handle those as well. They are not insignificant preference and fraudulent conveyance actions.

I know that myself and the Trustee had very much enjoyed working with Windels Marx, but beyond that we feel there has been work that has been superb and we strongly move that it be approved.

MR. BELL: On behalf of SIPC we filed another recommendation in support of the fees requested by Windels Marx and would support an order by this Court.

THE COURT: Does anyone want to be heard?

I will grant the request by Windels Marx. It may very well be they come under the same statute, 78fff5c, based upon the consolidation order, and the

approval of this Court as well as the real fact that they have been working as attorneys in sort of a hybrid fashion and now in a more direct fashion for the Trustee.

MR. SHEEHAN: Your Honor, I would just point out that I will be turning to our application and that Mr. Picard, the Trustee, would like to address the Court.

MR. PICARD: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. PICARD: Irving Picard, SIPA Trustee. This is my third application for interim compensation. It covers the four-month period ending January 31, 2010.

For the period I seek a total $671,591.25, of which $570,852.56 would be paid, and $100,738.69 will be deferred until the further order of the Court.

I also seek reimbursement of actual and necessary expenses totalling $77.66.

In connection with my fees, I would note that my fees start with a 10 percent discount for my hourly rates.

In addition, as noted in the applications that I will address in a little while, there are other hours that have not been billed for.

SIPC has filed a recommendation in support of the interim fee application. As I noted in my

application, the general estate will not be sufficient to pay administrative expenses, which included paying for the professional fees which are such as those you have already approved, mine and Baker Hostetler's.

Under the circumstances, SIPC is required to advance the funds to the Trustee to pay the amounts awarded. There is no difference between their recommendation and the amounts applied for. As you noted, this status provide that the Court should award the amounts recommended.

There is one objection that was filed by Diane and Roger Peskin, Maureen Ebel and a large group of investors. As set forth in the response papers that we have filed, the objection includes a number of arguments that have previously been rejected by Your Honor.

The motion for leave to appeal, the first fee application order was denied by the district court and the second one on the second application is still pending.

The crux of the objections are as I see it they are talking about, I have a conflict of interest. They both stood there and they attempted to bolster their argument by seeming to say since we have a disagreement on various legal issues, that both I and Baker Hostetler should be disqualified.

I personally and I am sure Baker does not

believe that provides a basis for disqualification and that is what was set forth in the response.

I won't belabor that point, Your Honor. During the period of my application, a substantial amount of time was spent in connection with moving customer claims and dealing with objections to determinations Your Honor. Your Honor had the briefing in that equity issue which you decided in March.

We started working on the next major group, by which you have entered a scheduling order in April, that will be heard during the fall.

Before that time, Your Honor, you will be seeing other objections coming before the Court on matters that do not raise some of the nitty-gritty issues and some of the more difficult issues and don't all fit together in one package.

The task of recovering assets is ongoing and, as you know, it is international in scope. As you have heard, we have six or so foreign counsel, many of whom have been instrumental in helping us locate people to depose and also helping us follow the trail.

My activities are generally set forth in my application. I also would refer Your Honor to the amended third interim report that was filed in April.

Next, turning to the claims, we received

16,312 customer claims from persons claiming to have lost money in the Ponzi scheme. That, of course, includes a substantial number of people who are relying on their November 30th statements.

As I previously reported, Your Honor, in December of 2008, there were approximately 4,900 accounts that were opened. Thus, if you look at the bare numbers, we have received more than 11,400 claims from persons who did not have accounts in their respective names.

Many of these latter people were entities invested through various types of funds, including pension or profit-sharing trusts, family partnerships, limited liability companies and the like.

Each claim has a story and each one is reviewed before a determination letter is sent out.

As of January 31, we had determined 11,861 customer claims, allowing claims for more than 4.55 million and SIPIC, at that point, it committed approximately 629 million dollars for advances.

I am pleased to report that as of April 30, those numbers have increased.

On January 31, we had determined approximately 72.7 percent and as of April 30, the number is above 76 percent.

SIPC's commitment now is up to over 682.8

million dollars.

In addition, during that period we resolved a number of avoidance matters without requiring litigation for an amount totalling approximately 262.4 million dollars.

Since then, there have been other recoveries, including 220 million dollars from the Levy family, and other recoveries that have been made during the claims processing period.

We are very hopeful, Your Honor, in the very near future we will be announcing some significant settlements that will put us in a position to do an allocation and an interim distribution to customers. We are hopeful that the application will be filed and we could have a hearing as of, perhaps, as early as late summer or early fall.

As set forth in my application during the four-month period, the major areas in which I devoted time out of the 947.7 hours, approximately 30 percent was spent in connection with claims review.

Approximately 154 hours in attending to various Bankruptcy Court matters.

133 hours were in case administration. About 10 percent of the time was concerned with the Trustee's investigation.

Based on my normal hourly rates during the period I would be seeking expenses of 746,000 plus dollars. But as I have indicated previously, I agreed with SIPC to reduce my hourly rate by 10 percent. That is a reduction of about $75,000. So as a result, I'm requesting $671,591.25 of which $100,738.69 would be deferred.

Additionally, in consideration of good billing practice I have written off or not billed approximately $117,000. I seek the discounted amount at this time.

I would also seek $77.66, which are related to some long distance telephone calls and travel. As in lawful travel. In the past, as I have indicated, in both the application and to the Court, I will pay over to Baker Hostetler the full amounts of any interim compensation expense reimbursement that is awarded or paid.

As I noted at the outset, SIPC has filed its recommendation in support of the Trustee's application.

I would be happy to answer any questions that Your Honor may have.

THE COURT: Does anyone want to be heard? Thank you. Thank you, Mr. Smith.

MR. SMITH: We have an objection to both Mr. Picard and Baker Hostetler. So maybe it make sense for Mr. Sheehan to go on now and speak on behalf of Baker

Hostetler.

THE COURT: Very well.

MR. SHEEHAN: The arguments are well stated in the pleadings. Fees of $23.884,085.25 is being sought and expenses of $390,204.85 satisfied. The same arithmetic applies for counsel to the Trustee, as far as the discount and 15 percent holdback, Your Honor.

It is almost impossible for me here to summarize exactly what we have done. We have submitted to your Honor unredacted time sheets which are voluminous as I know Your Honor knows.

Suffice it to say there are multiple facets to this case requiring the attention of many attorneys. The difficulty in summarizing that is the size of it.

We have the customer claim process, for example, and right now there are over 2,700 objections, and that does not include the 1,900 that were filed with regard to the customer status issue that is part of the scheduling order.

In addition to that, Your Honor, there are 4,000 outstanding claims all of which have been to be determined at this time. Many of which involve, Your Honor, individual issues, as Mr. Picard has indicated, of ownership.

All of those require both a legal and

factual analysis in order to determine the status of who the customers are as well as, obviously, the forensic accounting in terms of establishing the amount that may be due to the customer in the event of an allowed claim.

Needless to say, countless hours were spent just on that and it is a top priority of the Trustee, and we will move as aggressively as we can move those customer claims going forward.

In addition to those, there are, of course, other litigations that are filed before Your Honor and you are familiar with that, including Chais, which was argued before you this morning and many others, Picower, which is in settlement discussions as has been well reported and a number of others that are ongoing before Your Honor.

In addition to those, there are literally dozens, if not hundreds of litigations that are being reviewed and contemplated in connection with the over 20 billion dollars that was paid out in the short period of time of about 24 months prior to the demise of the BLMIS.

Those constitute significant potential recoveries by the Trustee of customer property. We are doing our very best to deal with those in an applicable way. It may very well be before the end of the year there will be a significant number of claims that will be filed.

The approach of the Trustee throughout with

regard to both large and small, people who are net winners and losers, who have received what we believe to be preference and fraudulent conveyances consisting of false profits, we have reached out to those folks.

And the feeder funds as well as the individual funds, they require a great deal of time but we believe it is the best approach. This is a case in which no one feels as though they win. Everyone feels as though they lost, the winner and the losers. We recognize that. We do our very, very best to work with them as best as we can to work out an accommodation if we can.

Those that are significant, obviously, Your Honor is going to see. Those that are small, and there are many that are very small, you don't as we are not required under the rules.

But in each and every case we are in contact with counsel especially with the feeder funds, but in connection also with many of other individuals in conducting our investigation and working out what we can in negotiations and settlement. If we can't do that, as I have said, we will see a lot of complaints. Those involve the feeder fundss throughout Europe, Caribbean, British Virgin Islands, the Caymans, and Bermuda. That is why we have all the counsel we retained, as each of those are very, very complicated.

As is reflected in our time records, what we have found is that Mr. Madoff became a securitized debt. We found there are very sophisticated transactions involving major financial institutions as well as the feeder fundss, where multiple layers of debt were incurred funded by the Madoff returns. They were, as we all know, available for years and years and there were steady returns. They were just the kind of returns that people in the financial industry looked to securitize, to create those instruments, swaps, and credit the swaps.

All of that is involved in the Madoff enterprise involving not just Mr. Madoff but also involving all the people with whom he dealt. These are enormously complicated an require a good deal of deconstruction and each one of those represents hundreds and hundreds of millions of dollars in potential recovery.

The efforts you can see from our records reflect that as do things that don't appear necessarily in the Court's record but are reflected in Your Honor's review in the time records, but I can talk about them openly here, they are reflected in our investigations and it's well known to people on the other side. We are not doing things that counsel is not fully aware of because we are in negotiation with most of them before proceeding with litigation against them.

We are well aware of the statute and we are well prepared to follow through with those if we have to.

In addition to all that work, there is an ongoing array, a good deal of it before Your Honor, of what I would call individual litigation that occurs just in the administration of the estate. Whether it be seeking injunctive relief before Your Honor, whether it be dealing with various motion practices that we have that is not related to a specific litigation, and as Your Honor is aware, there is a good deal of that occurs as well.

So we have multiple teams involved in each of those endeavors, as again it's reflected in our time records.

I believe that all of the work and I know the SIPC Trustee agrees and supports it. We are reviewed very, very carefully. I prepare that bill along with some assistants working diligently every month. I could tell you for a fact there are many, many conversations with SIPC where they review specifically who is at a meeting, how many people are attending, how much time is spent, was it productive, what were you specifically seeking to do.

This is by far not a rubber stamp. This is a very intensive review that takes place every month by SIPC, with regard to this at two levels. Both at the assistant general counsel, Mr. Bell, who is here, as well

as by general counsel herself.

So, Your Honor, when this arises before you it arises before you after having thoroughly been reviewed and approved by SIPC. I would respectfully ask Your Honor to approve our application.

MR. BELL: Your Honor, I thank Mr. Sheehan for his talk about the exhaustive review that SIPC does with regard to the Trustee and counsels monthly applications pursuant to this Court's monthly compensation order.

There are many discussions about the fees. There are many pages in the applications. I could advise the Court that each and every page is reviewed. Discussions are had and decisions are made, and SIPC after that review, with the concurrence of the Trustee and counsel, will follow the monthly procedures order and pay.

SIPC does that at two levels. At my level, I am the staff attorney on the case even though I have a title.

Then it is done by general counsel and the general counsel and I have engage in extensive discussions after I have had my extensive discussions with the Trustee and its counsel.

So the thoroughness of this review I could assure the Court where we say, carefully evaluated, I think

you could use the words that we exhaustively evaluate the applications. We take this responsibility extremely seriously.

So we have done the review and we have followed our recommendation by SIPC's general counsel, and we support the entry of an order for the approval of the applications as filed.

MR. SMITH: Good afternoon, Your Honor Peter Smith of Becker & Poliakoff, on behalf of the objection filed by the Peskins and other customers.

Your Honor, I will just address the issue of the most recent grounds contained in this objection, not the ones that reiterate or reiterate from the first two objections that were filed, but I would mention are subject to appeals. Specifically that the Trustee an his counsel's involvement in the Canavan adversary proceeding filed last month, around April 5 or so, in which the Trustee and counsel seek to enjoin an action filed in the district court in New Jersey. On April 13, Your Honor denied the application for a TRO.

The hearing on the preliminary injunction motion is rescheduled, pending some discovery disputes.

The Trustee and his counsel we believe had disqualified themselves, we believe, based on the positions they have taken in the adversary proceeding because they

have essentially argued the position of the defendants in that New Jersey action. Therefore, they are directly adverse to every customer who would benefit from a positive judgment in that proceeding.

The Trustee and his counsel have made substantive and procedural defenses, asserted them on behalf of the defendants who are in the New Jersey action that even the defendants themselves in the action have not made.

All the defendants in that action have done is to seek to have the action transferred here. When it gets here Your Honor will have a preview I suppose of all the defenses that they will raise.

There is no basis, Your Honor, for them to have done that in their papers.

I just want to give you a few examples of what was contained in the motion for preliminary injunction.

THE COURT: This is a request for fees.

MR. SMITH: What we argue, Your Honor, that is --

THE COURT: I am hearing more of a defense with respect to the litigation that is pending before me.

MR. SMITH: No, Your Honor, we will hear more of that I suppose in the weeks to come, but the issue

right here --

THE COURT: You say that they should not be asking for fees for their involvement in the New Jersey litigation.

MR. SMITH: I don't think I said that.

THE COURT: Isn't that what you are saying?

MR. SMITH: Their fees for whatever they do or have done in the New Jersey application are probably not part of the application because I think this one cut off in January.

THE COURT: But, nevertheless, it is their activities supports their argument that they have that it has disabled them for asking for fees because they are breaching some duties that they have.

MR. SMITH: I believe that the breach of duty is their loyalty to the customers. And I think it is very clear that any customer who would see those papers, and customers are aware of what is going on in those proceedings, they are aware of this fee application --

THE COURT: One wonders when one peels it away whether everyone under your theory could be disabled under those same theories.

MR. SMITH: Who else could be?

THE COURT: All counsel.

MR. SMITH: No, only the counsel who took

the position contrary --

THE COURT: That is an opinion that you have.

MR. SMITH: They are arguing the position of the defendants.

THE COURT: Let me hear you out.

MR. SMITH: Okay. So, Your Honor, the customers to whom the Trustee is supposed to be loyal can only view the complaint for the preliminary injunction in one way, which is that the Trustee and his counsel have put that aside in this regard with respect to the persons who the customers are suing to recover damages. For that reason it is impossible for there not to be an appearance of a conflict of interest between the Trustee and Baker Hostetler to whom they are supposed to be loyal in this proceeding.

For that reason, they should not receive their fee and there should at least be an evidentiary hearing as to whether they should be disqualified.

THE COURT: Thank you.

MR. SMITH: Your Honor.

MR. SHEEHAN: Your Honor, I don't intend to argue the motion here. I will say one thing. I would suggest there are a great many customers that would think what we are doing in terms of trying to preserve this

Court's jurisdiction in connection with the net equity ruling which is a whole thrust of why we are seeking to have that case enjoined and why the people in New Jersey are seeking to have it transferred here, there are a whole host of customers who have bought that argument. I will leave it out there.

MR. SMITH: Your Honor, I will say this quickly, if the only goal was to protect the net equity decision they would not have to raise defenses for the defendants. They could have stopped on the ground for the preliminary injunction without saying all of the things they said in their motion how the claims are without merit; however there are procedural problems with that complaint. They did not have to say anything further. They have yet to answer for why they did these things.

If it is not they are advocating on behalf of those defendants, why on earth did they do it? There is no basis for it. Thank you.

THE COURT: Thank you. I will overrule your objection. It is quite obvious that the objectors here are on the other side of many litigations with the Trustee.

It is always interesting that it would be part of the practice, and it shouldn't be to try to disable your adversaries or take a legal position based on the fact

you seek to disable counsel.

But as I have pointed out in my statements previously, I think if one peels away all the interests that the various parties represent, one might find very easily an appearance of conflict of interest of counsel, and I could think of several areas which were involved in all of the litigations before me.

What is clear to me, and one of the reasons I am rejecting the argument here, is that these objectors and their counsel have been very active in creating new litigation made of sandboxes in multiple jurisdictions, which in some form indicates a disagreement with the Court's net equity decision.

It is understandable that the objectors would seek to have the Trustee disabled, but that is not a ground here for arguing against the consideration by this Court of the request for fees under 78 -- and I won't go through all of the Es -- when SIPC finds the fees appropriate and the disinterestedness of the Trustee has already been measured in the early part of the proceeding, that the statute has the words, "award the amounts recommended."

I find no basis for finding that the Trustee should be found to have an appearance of a conflict of interest. As a matter of fact, I think there is an

obligation wherever the administration of the Madoff estate is a implicated for the Trustee to appear and deal with that.

That essentially is the main argument that is being made today, the additional argument that is being expressed.

If you bring on litigation, it is obvious that the Trustee has to go and react to it if that litigation implicates the administration of the estate, and that is apparently is the case here.

Objection is overruled. The decision is reserved with respect to all motions thus heard.

MR. SHEEHAN: Your Honor, I have an order that I would like to submit, if I may approach.

THE COURT: Yes.

MR. SHEEHAN: Thank you, Your Honor.

THE COURT: It is unfortunate but more litigation, more fees.

I have approved the order.

MR. SHEEHAN: Thank you very much, Your Honor. Thank you for all your time.

THE COURT: Thank you.

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C E R T I F I C A T E

STATE OF NEW YORK }
} ss.:
COUNTY OF NEW YORK }

I, MINDY CORCORAN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That I reported the proceedings in the within entitled matter, and that the within transcript is a true record of such proceedings.

I further certify that I am not related, by blood or marriage, to any of the parties in this matter and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of May, 2010.

Mindy Rothman-Corcoran

Digitally signed by Mindy Rothman-Corcoran
DN: cn=Mindy Rothman-Corcoran, c=US
Reason: I am the author of this document
Date: 2010.05.10 15:05:41 -04'00'

MINDY CORCORAN